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2 **UNITED STATES DISTRICT COURT**
3 **SOUTHERN DISTRICT OF CALIFORNIA**
4

5 ADRIAN ALEXANDER ORTIZ-
6 FLORES, a minor, by Terri Ortiz, his
7 guardian; TERRI ORTIZ as individual
8 consumers, and on behalf of all others
9 similarly situated,

10 Plaintiffs,

11 vs.

12 MCNEIL-PPC, INC., a New Jersey
13 corporation,

14 Defendant.

15 CASE NO. 07 CV 0678 BEN (CAB)

16 **PLAINTIFFS' AND DEFENDANT'S**
17 **JOINT FED. R. CIV. PRO. 26(f)**
18 **REPORT**

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1 **TO THE COURTS, ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 This Joint FRCP Rule 26(f) report is submitted for the *Ortiz-Flores v.*
3 *McNeil-PPC, Inc.*, Case No. 07 CV 0678 BEN (CAB), (S.D. Cal.) ("Ortiz-Flores")
4 and *Pointer v. McNeil-PPC, Inc.*, Case No. CV-07-PT-1615-M, (N.D. Ala.)
5 ("Pointer") cases.

6 Plaintiffs in the *Ortiz-Flores* case are referred to herein as "Ortiz-Flores
7 Plaintiffs."

8 Plaintiffs in the *Pointer* case are referred to herein as "Pointer Plaintiffs."

9 The Ortiz-Flores Plaintiffs and Pointer Plaintiffs are collectively referred to
10 herein as "Plaintiffs."

11 Defendant McNeil-PCC, Inc. is a defendant in both cases and is referred to
12 herein as "Defendant."

13 Plaintiffs and Defendant are referred to collectively herein as the "Parties."

14 1. **FRCP 26(f) Meeting.** On December 4, 2007 and December 13, 2007, the
15 Parties conferred telephonically in accordance with FRCP 26(f). Unless otherwise
16 indicated, the following attorneys attended both calls:

- 17 • Howard Rubinstein (for Ortiz-Flores Plaintiffs);
- 18 • Harold Hewell (for Ortiz-Flores Plaintiffs);
- 19 • Bevin Allen (for Ortiz-Flores Plaintiffs);
- 20 • Dennis G. Pantazis (for Pointer Plaintiffs on 12/4/07 call only);
- 21 • Craig L. Lowell (for Pointer Plaintiffs on 12/13/07 call only);
- 22 • David Noonan (for Defendant in Ortiz-Flores case);
- 23 • Sidney K. Kanazawa (for Defendant in Ortiz-Flores case);
- 24 • Jia-Ming Shang (for Defendant in Ortiz-Flores case);
- 25 • Lee M. Pope (for Defendant in Pointer case);
- 26 • James C. Barton, Jr. (for Defendant in Pointer case);
- 27 • Alan D. Mathis (for Defendant in Pointer case);
- 28 • Jerome A. Swindell (in-house counsel for Defendant on 12/13/07 call

1 only).

2 2. **Procedural Facts.** This case arises out of an April 11, 2007 voluntary recall
3 by Defendant of a plaque identifying liquid dental product called Agent Cool Blue
4 (a press release regarding the recall is attached hereto as Exhibit 1). The Ortiz-
5 Flores Plaintiffs filed their class action case against Defendant in the United States
6 District Court for the Southern District of California on April 13, 2007. The
7 Pointer Plaintiffs filed their class action against Defendant in the United States
8 District Court for the Northern District of Alabama on September 6, 2007.

9 3. **Claimed Class Action Status.** Both the Ortiz-Flores Plaintiffs and Pointer
10 Plaintiffs are seeking class action status in their respective cases.

11 Plaintiffs claim the following class should be certified by the court:

12 1) All consumers within the United States who purchased the Agent Cool
13 Blue product.

14 2) All consumers within the United States who purchased the Agent Cool
15 Blue product who have and/or continue to suffer from personal injuries
16 due to the use of the Product, including those that will require medical
17 monitoring of their injuries.

18 4. **Claimed Basis of Liability.** Plaintiffs claim Defendant is liable to the class
19 on the following theory:

20 Defendant's design, testing, manufacture and development of the Agent Cool
21 Blue Product was negligent and/or defective, and that Defendant did not take
22 adequate precautions to ensure the safety of the Product. Defendant has been
23 unjustly enriched by the sale of the defective product.

24 5. **Defense Position.** Defendant does not agree a class should be certified in
25 either case and does not agree there is a causal connection between the contents of
26 the product and the injuries presented by Plaintiffs.

27 6. **Pre-Discovery Disclosures.** The Parties will exchange Initial Disclosures
28 pursuant to FRCP 26(a)(1) by December 19, 2007.

1 7. **Class Certification Motion Date and Court.** The Parties have discussed
2 and tend to agree that a single Class Certification Motion should be heard *on or*
3 *before April 28, 2008.* The Parties have not agreed, however, on which court
4 should hear the class certification motion (Alabama or California) or on how the
5 Alabama and California cases should be coordinated for class certification
6 purposes. Plaintiffs have indicated that they need to see Defendant's initial
7 disclosure in order make this determination. Accordingly, the Parties have agreed
8 to a continued joint telephone conference prior to the next status conference in the
9 Ortiz-Flores matter at ***9:00 am Pacific Time on Monday, January 7, 2008*** to
10 discuss this issue further after the initial Rule 26(a)(1) disclosures.

11 8. **Trial Date.** The Parties have discussed but do not agree on the appropriate
12 date or procedure for trial. Plaintiffs believe trial should commence *on or before*
13 *September 1, 2008.* Defendant believes that date is too optimistic for a class action
14 and believes a more realistic date for trial would be in ***March 2009.*** The Parties
15 have also not agreed on the appropriate court for trial nor the appropriate procedure
16 for coordinating the Alabama and California case for trial. Plaintiffs have indicated
17 that they need to see Defendant's initial disclosure in order make these
18 determinations. Accordingly, the Parties have agreed to a continued joint telephone
19 conference at ***9:00 am Pacific Time on Monday, January 7, 2008*** to discuss this
20 issue further after the initial Rule 26(a)(1) disclosures.

21 9. **Discovery Plan.** To avoid overlap and duplication of discovery, the Parties
22 agreed to coordinate discovery in both cases.

23 a. **Discovery Limitations.** Due to the relatively few named parties
24 involved, the Parties believe that the discovery procedures and limitations provided
25 in the Federal Rules of Civil Procedure will be sufficient.

26 b. **Protective Order.** Due to the potential for trade secrets and other
27 proprietary information to be produced in discovery, the Parties have agreed to and
28 obtained a protective order from the *Pointer* and *Ortiz-Flores* courts.

1 c. **Discovery Cut-Off Date.** Due to a lack of agreement on an
2 appropriate date and the procedure to be followed for trial, the Parties did not agree
3 to a cut-off date for discovery.

4 d. **Maximum Discovery.** Within the coordinated discovery, unless
5 otherwise agreed or ordered by the court, there shall be:

- 6 • A maximum of 25 interrogatories by Plaintiffs to Defendant and by
7 Defendant to Plaintiffs with responses due 30 days after service;
- 8 • A maximum of 25 requests for admissions by Plaintiffs to Defendant
9 and by Defendant to Plaintiffs with responses due 30 days after
10 service;
- 11 • A maximum of 10 depositions by Plaintiffs and 10 depositions by
12 Defendant with each deposition limited to maximum of 7 hours unless
13 extended by agreement of parties.

14 e. **Expert Reports.** Due to a lack of agreement on the appropriate date
15 for trial, the date for an exchange of reports from retained experts under Rule
16 26(a)(2) has not yet agreed upon by the Parties.

17 f. **Supplementing Discovery.** Supplementation of discovery under Rule
18 26(e) shall be due within 30 days of knowledge of the need to supplement but not
19 later than 30 days before the completion of discovery.

20 g. **Subjects of Discovery.** The Parties agreed that discovery should be
21 taken on the identity of Defendant's employees involved in the testing of the out-of-
22 spec Agent Cool Blue products, the identity of Defendant's employees who made
23 the decision to initiate a recall, Defendant's investigations into the out-of-spec
24 Agent Cool Blue products, and Defendant's distribution of the Agent Cool Blue
25 product. Defendant contends discovery should be taken regarding the causal
26 connection between any physical injuries and the Agent Cool Blue product and
27 regarding class certification issues. Plaintiffs contend discovery should be taken
28 regarding the FDA's recall and investigation, Defendant's production and testing

1 processes, including the objects used in the production of this product and other
2 similar products manufactured by Defendant and information regarding the design
3 and manufacture of the initial preservative system utilized in the Agent Cool Blue
4 Product.

5 h. **Electronic Discovery.** The Parties are investigating the parameters
6 for any electronic discovery in this case.

7 10. **Other Items.**

8 a. **Scheduling Conference.** The Parties request a conference with the
9 court before entry of the scheduling order.

10 b. **Pretrial Conference.** The Parties did not reach an agreement on this
11 date because of the Parties' disagreement on the appropriate date for trial.

12 c. **Plaintiffs' Joinder/Amendment to Pleadings.** The Parties did not
13 reach an agreement on this date because of the Parties' disagreement on the
14 appropriate date for trial.

15 d. **Defendant's Joinder/Amendment to Pleadings.** The Parties did not
16 reach an agreement on this date because of the Parties' disagreement on the
17 appropriate date for trial.

18 e. **Dispositive Motions.** All potentially dispositive motions should be
19 heard no later than 60 days before trial.

20 f. **Final Witness and Exhibit Lists.** Due to the Parties' disagreement
21 on the appropriate date and court for trial of this coordinated matter, no agreement
22 was reached on these open issues. A further discussion will take place on this issue
23 when we reconvene the Parties' conference call on *Monday, January 7, 2008 at*
24 *9:00 am Pacific Time.*

25 g. **Objections to Final Witness and Exhibit Lists.** Due to the Parties'
26 disagreement on the appropriate date and court for trial of this coordinated matter,
27 no agreement was reached on these open issues. A further discussion will take
28 place on this issue when we reconvene the Parties' conference call on *Monday,*

1 **January 7, 2008 at 9:00 am Pacific Time.**

2 h. **Expert Discovery.** The Parties did not discuss expert discovery and
3 have agreed to postpone such discussion until our next joint call on **Monday,**
4 **January 7, 2008 at 9:00 am Pacific Time.**

5 i. **ADR.** Plaintiffs have proposed involving former Judge Lourdes G.
6 Baird as a potential mediator in this case. Defendant is not inclined to agree
7 because of the causation gap in this case. The tests and medical records examined
8 to date do not reveal a causal connection between contamination at the factory or
9 the preservatives used in this product and any test or illness disclosed by Plaintiffs.

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11 Dated: December 19, 2007

12
13 By: Howard Rubinstein/JMS - *per email authority
in 12/19/07 email*
14 Howard Rubinstein
15 Attorneys for Plaintiff Ortiz-Flores.

16 Dated: December 19, 2007 HEWELL LAW FIRM, PC

17
18 By: Harold Hewell /JMS - per email authority
in 12/19/07 email
19 Harold Hewell
Attorneys for Plaintiff Ortiz-Flores.

20 Dated: December 19, 2007 MILSTEIN, ADELMAN, & KREGER, LLP

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23 Bevin M. Allen
24 Attorneys for Plaintiff Ortiz-Flores.

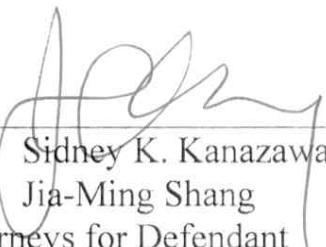
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26 //
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1 Dated: December 19, 2007

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7 Dated: December 19, 2007 MCGUIREWOODS LLP

8 By: 
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10 Jia-Ming Shang
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13 Dated: December 19, 2007

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16 Jill E. Randall
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19 Dated: December 19, 2007

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